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**Federal Communications Commission**

**DA 96-1185**

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	MM Docket No. 96-161
Table of Allotments,	)	RM-8842
FM Broadcast Stations.	)	
(Carlisle, Irvine and Morehead, Kentucky)	)	

**NOTICE OF PROPOSED RULE MAKING**

Adopted: July 26, 1996;

Released: August 2, 1996

Comment Date: September 23, 1996

Reply Comment Date: October 8, 1996

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making jointly filed by James P. Gray, licensee of Station WCAK(FM), Channel 264A, Carlisle, Kentucky; Kentucky River Broadcasting Company, licensee of Station WCYO(FM), Channel 291A, Irvine, Kentucky; and WMOR, Inc., licensee of Station WMOR(FM), Channel 221A, Morehead, Kentucky ("petitioners"), proposing the substitution of Channel 221C3 for Channel 264A at Carlisle; the substitution of Channel 264C3 for Channel 291A at Irvine; the substitution of Channel 291C3 for Channel 221A at Morehead, and the modification of the stations' respective licenses accordingly. Petitioners state their intention to apply for the upgraded channels, if allotted.

2. In support of their proposal, petitioners state that their stations are limited in their power and that they are prohibited from upgrading their facilities on their own or adjacent channels due to spacing restrictions presented by their respective stations. Petitioners assert that the proposed nonadjacent upgrades constitute "incompatible channel swaps" and should be protected from competing expressions of interest consistent with the adjacent channel upgrade provisions of Section 1.420(g)(3) of the Commission's Rules. Section 1.420(g)(3) allows the modification of a station's license to a higher class channel if the channel is a co-channel or adjacent channel mutually exclusive with the existing license. However, the Commission has acknowledged that it will consider analogous proposals involving channel substitutions at other communities which would be necessary to create a mutually exclusive relationship required under Section 1.420(g)(3), and has determined to consider these "incompatible channel swaps" on a

case-by-case basis. See Modification of FM Broadcast Licenses to Higher Class Co-Channel or Adjacent Channels, 60 RR 2d 114 (1986).

3. We believe the proposed upgrades warrant consideration since they would enable Stations WCAK(FM), WCYO(FM) and WMOR(FM) to expand their coverage area and improve their broadcast services to a greater number of people. An engineering analysis has determined that Channel 221C3 be allotted to Carlisle in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.1 kilometers (8.1 miles) east;<sup>1</sup> Channel 264C3 can be allotted to Irvine with a site restriction of 7.7 kilometers (4.8 miles) west to avoid short-spacings to the licensed sites of Station WWYC(FM), Channel 261C2, Winchester, Kentucky, and Station WSGS(FM) Channel 266C, Hazard, Kentucky;<sup>2</sup> and Channel 291C3 can be allotted to Morehead with a site restriction of 3.6 kilometers (2.3 miles) west to avoid a short-spacing to the licensed site of Station WMST-FM, Channel 288A, Mount Sterling, Kentucky.<sup>3</sup>

As requested, we shall also propose to modify the licenses of Stations WCAK(FM), WCYO(FM) and WMOR(FM) to specify operation on Channels 221C3, 264C3 and 291C3, respectively. In accordance with Section 1.420(g)(3) of the Commission's Rules, any party expressing an interest in the respective channels should demonstrate why these proposals are not "incompatible channel swaps" such that their expressions of interest are foreclosed.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Carlisle, Kentucky	264A	221C3
Irvine, Kentucky	291A	264C3

<sup>1</sup>The coordinates for Channel 221C3 at Carlisle are North Latitude 38-17-42 and West Longitude 83-52-32.

<sup>2</sup>The coordinates for Channel 264C3 at Irvine are North Latitude 37-43-27 and West Longitude 84-02-38.

<sup>3</sup>The coordinates for Channel 291C3 at Morehead are North Latitude 38-11-17 and West Longitude 83-28-37. We note that the coordinates are short-spaced to Station WFLE-FM, Channel 292A, Flemingsburg, Kentucky. However, pursuant to Report and Order, MM Docket No. 95-137, Station WFLE-FM's license has been modified to specify operation on Channel 236A at Flemingsburg. See 11 FCC Rcd 6374 (1996). Therefore, since the Morehead allotment is dependent upon Station WFLE-FM moving to Channel 236A, issuance of a license for Channel 291C3 at Morehead may be withheld until the license for Channel 236A at Flemingsburg is granted. We will provide the licensee of Station WFLE-FM with a copy of this Notice of Proposed Rule Making.

Morehead, Kentucky

221A, 242A

242A, 291C3

5. IT IS ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this Notice of Proposed Rule Making to the following:

Fleming County Broadcasting, Inc.  
P.O. Box 452  
Flemingsburg, Kentucky 41041  
(Licensee of Station WFLE-FM)

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before September 23, 1996, and reply comments on or before October 8, 1996, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows

James S. Neely, Esq.  
Miller & Miller, P.C.  
P.O. Box 33003  
Washington, D.C. 20033  
(Counsel for Petitioners)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the

proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos  
Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

Attachment: Appendix

APPENDIX

MM Docket No.96-161  
RM-8842

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposals in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed

comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Center (Room 239) at its headquarters, 1919 M Street N.W., Washington, D.C.